Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1567

INTERMEDIATE ACCOUNTING OF THE PUBLIC ADMINISTRATOR of the County of New York, as Administrator of the Estate of

JOHN PATRICK, also known as JOHN P. FAY,

Deceased,

VIOLET JOSEPHINE FAY BUCK,

Appellant,

FLORENCE SYLVIA WETHERALL HUNTER, KATE WETHERALL SPENCER and LAURETTE CAILLOL,

Appellees,

STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	2
Argument	4
Conclusion	11

TABLE OF CASES

Geduldig v. *Aiello*, 417 U.S. 484 (1974) 5
Labine v. *Vincent*, 401 U.S. 532 (1971) 6, 10
Lalli v. *Lalli*, 431 U.S. 911 (1976) 4
Trimble v. *Gordon*, 401 U.S. 532 (1971) 4, 6, 7, 8, 9, 10

STATUTES

Illinois Probate Act, § 12 6
New York Estates, Powers and Trusts Law
§ 4-1.2(a)(b) 1, 2, 3, 4, 6, 7, 8, 9, 10
28 U.S.C. § 1257(a) 2

MISCELLANEOUS

4th Report, Temporary State Comm. on Modernization, Rev. and Simplification of Laws on Estates, N.Y. Legis. Doc. 1965, No. 19, pp. 233-271 9

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The appellee, Attorney General of the State of New York, appearing pro se on behalf of the constitutionality of the New York Estates, Powers and Trusts Law, § 4-1.2(b), pursuant to Rule 16 of the Rules of this Court, respectfully moves that this appeal be dismissed for want of a substantial federal question or that the judgment below be affirmed.

Opinions Below

The opinion of the New York Court of Appeals is published at 44 N Y 2d —— (1974). The opinion of the Appellate Division of the New York Supreme Court, First Department is published at 55 A D 2d 541 (12). The opinion of the Surrogate's Court, New York County is unreported and is not provided by the appellant in her "jurisdictional statement."

Jurisdiction

Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2).

Statute Involved

Estates, Powers and Trusts Law, § 4-1.2(a) and (b) is reproduced at p. 3, Jurisdictional Statement.

Statement of the Case

Appellant seeks to declare unconstitutional a section of the Estates, Powers and Trusts Law of the State of New York, i.e., § 4-1.2(b). This proceeding was instituted in Surrogate's Court, New York County by the Public Administrator of that county to settle his account as administrator of John Patrick Fay, a/k/a John P. Fay's intestate estate. Appellant Buck interposed objections to said account alleging to be a distributee of John Patrick Fay, a/k/a John Fay (hereinafter referred to as "decedent"). The Surrogate dismissed appellant's objections.

The Surrogate found that: "decedent" was illegitimate; "decedent" was survived by three maternal nieces (co-appellees) and a paternal half-sister (appellant) as his intestate relatives; EPTL § 4-1.2 was constitutional; and that

pursuant to EPTL § 4-1.2 "decedent's" distributees at law were his three maternal nieces.

The decree of the Surrogate was affirmed for the reasons stated by the Surrogate in the Appellate Division of the New York State Supreme Court.

The New York State Court of Appeals reviewed the constitutionality of the statute at bar and held that the statute was constitutional and further upheld the determinations of the lower courts.

For the purpose of this appeal there are no factual disputes. No order of filiation was ever entered indicating that the "decedent", John Patrick Fay, was the son of John Fay.

John Fay, the alleged father of "decedent", purportedly executed a civil registration of birth for one John Herbert Fay—illegitimate. See: Jurisdictional Statement, Appendix F, p. F-1. The instrument in question acknowledges the birth of John Herbert Fay. The "decedent" in the case at bar is John Patrick Fay a/k/a John P. Fay. What the intentions of John Fay were in executing this instrument are only speculative. To consider the execution an absolute acknowledgment of paternity in this matter is to speculate beyond rational comprehension.

However, the execution of this instrument is neither relevant nor dispositive of the true and simple issue involved in this case.

EPTL § 4-1.2(b), the section of the state law under attack herein, provides that if an illegitimate dies, such as the decedent, John Patrick Fay, his surviving spouse, issue, mother, maternal kindred and father, may inherit as if the decedent were legitimate but the father may only inherit if an order of filiation had been obtained in accordance with the provisions of subparagraph 2 found in § 4-1.2(a) of the EPTL.

The Court of Appeals of the State of New York in construing § 4-1.2(b) concluded that it could not consider any

attack on the section based upon a claim of discrimination against paternal kindred unless first an order of filiation had been obtained and that such an order was in fact a condition precedent to any inheritance by the alleged father or his relatives.

In the case at bar, as indicated above, no order of filiation was ever obtained during the lifetime of the alleged putative father.

Argument

A

Appellant has failed to raise any substantial question as to the constitutionality of New York's Estates, Powers and Trusts Law, § 4-1.2 subd. (b).

Appellant improperly relies on *Trimble* v. *Gordon,* 430 U.S. 762 (1977), as a basis for her claim in seeking a distributive share of the intestate estate of "decedent" herein.

No matter how the decision of this Court in *Trimble* and the granting of probable jurisdiction by this Court in *Matter of Lalli* (*Lalli II*), 431 U.S. 911 (1976), is perceived, neither of those determinations is controlling or indeed applicable to the situation in the case at bar. While both in *Trimble* and in *Lalli II* this Court was and is concerned with the right of an illegitimate to claim against his putative father, the case at bar deals with a situation where a claim is being made against an illegitimate's estate for the benefit of the alleged putative father's relatives.

There is a substantial difference in "taking from" as opposed to "taking by".

While it is conceivable to apply a standard beyond "rational basis" or "minimal scrutiny" in a situation where the equal protection of an alleged "deprived class" such as an illegitimate is at issue, there is no reason to go

beyond a "rational basis" or "minimal scrutiny" test in a situation where someone is attempting to claim against that alleged class, *i.e.,* as in the case at bar.

In the instant proceeding appellant is not a member of an "illegitimate" or other protected class. Rather the appellant is attempting to take from the illegitimate's intestate estate by her status as an alleged paternal kinsperson. This situation does not constitute that factual setting mandating implementation of a test beyond the "rational basis" of a state in delimiting those who take by their own status. Appellant contends that this delimitation constitutes gender-based discrimination. This is fallacious in that paternal kinspersons are not deprived because of sex or gender and even so this Court has refused to recognize such class as suspect in nature. See: *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). New York must be afforded the right to balance the competing interests of all parties involved in distribution of assets derived from intestate estates. To scrutinize and construe paternal kinspersons as an insular minority invidiously discriminated against by the State of New York is to stretch the veil of the equal protection clause beyond reasonable comprehension.

It is conceded that this Court's scrutiny is not "toothless". However, this Court is not confronted with a factual situation even remotely relating to the latent discrimination alleged by appellant.

B

Even if we assume, *arguendo,* that the standards to be applied in judging a state statute are the same whether we are speaking about inheritance by an illegitimate or inheritance from an illegitimate, the New York State statute at bar is clearly constitutional and does not discriminate.

The determination of this Court in *Labine* v. *Vincent*, 401 U.S. 532 (1971), which left to each state the right to impose statutory restrictions with regard to inheritance by illegitimates, is controlling.

It is respectfully submitted that the Illinois statute declared unconstitutional by this Court in *Trimble* v. *Gordon*, 430 U.S. 762, *supra*, heavily relied on by the appellant herein, and EPTL 4-1.2 are in no way similar. The Illinois statute, § 12 of the Illinois Probate Act, made no provision whatsoever for an illegitimate to inherit from its natural father except under the very limited circumstances of where the natural parents intermarry and where the natural father then acknowledges his parentage of the child. On the other hand, the statute provided that an illegitimate child could inherit from its natural mother.

This Illinois statute did not concern itself with proof of parentage but rather provided for inheritance only from the mother without considering whether an illegitimate child was in fact a natural child of the father and whether such fact could be established.

EPTL § 4-1.2 on the other hand makes no distinction with regard to the right of inheritance of an illegitimate child from its natural mother or father.

EPTL § 4-1.2 does not limit the right of a child to inherit from its natural father and allows that right to exist side by side with the right to inherit from the natural mother.

The distinction in EPTL § 4-1.2 does not deal with the right to inherit but only with the manner in which the parentage itself is established.

There are obvious physiological differences which create by their very nature certain problems in determining whether any given man is the father of a child as opposed to some other man.

This Court in deciding *Trimble, supra,* recognized this fact and acknowledged that "The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for legitimate children claiming under their mothers' estates or for legitimate children generally." (430 U.S. 762, 770.) It was this very difficulty which this Court recognized as requiring a more demanding standard for illegitimate children claiming under their fathers' estates which the New York State Legislature is passing EPTL § 4-1.2 considered. The result of the legislators' consideration was the statutory requirement that there be a judicial determination of paternity during the lifetime of the alleged illegitimate's father.

Certainly it is not beyond the scope of legislative province to require a judicial finding of parentage with regard to an alleged putative father during his lifetime so that he might reasonably have an opportunity to contravene the contention of parentage.

This reasonable requirement represents a legitimate legislative purpose to avoid the perpetration of fraud on the People of this state with regard to the disposition of property passing intestate.

The New York Court of Appeals in deciding this case recognized the legitimate purpose of EPTL § 4-1.2 and the fact that this statute did not discriminate or violate the equal protection provisions of either the New York State Constitution or the Constitution of the United States.

It is respectfully submitted that the New York statute in question and the courts of this State have given adequate consideration to the statute's proper objective of assuring accuracy and efficiency in the disposition of property at death, something which apparently was not done by either the Legislature or courts of the state of Illinois and that

the New York statute is, as required by this Court, "carefully tuned to alternative considerations."

In this regard it is important to note that had the appellant in the *Trimble* case, *supra,* been a resident of the State of New York and had she made her claim under the New York statute now before this Court, she could have been successful in establishing her right to inherit. The illegitimate had, in Illinois, obtained an order of the Illinois court during the putative father's lifetime determining paternity and determining which putative father was indeed the father of the illegitimate.

Such an order under EPTL § 4-1.2 would have allowed the illegitimate to inherit from her father since no distinction is made in New York between the right of an illegitimate to inherit from either its mother or father once the paternity of the father is established in a judicial proceeding.

Under the Illinois statute which the Supreme Court of the United States declared unconstitutional, the illegitimate, although judicially determined to be the natural daughter of the putative father, was not entitled to inherit since an illegitimate under Illinois law could only inherit from its natural mother except in one specific case which required two affirmative acts on the natural father's part.

However, a careful reading of the entire opinion of this Court in the *Trimble* case, *supra,* does not lead to the conclusion that a state in the exercise of its right to control the distribution of property by inheritance cannot require a judicial proceeding as the only basis for establishing paternity of an alleged father provided, of course, that once such putative father is so established there is no discrimination with regard to the right to inherit from either the natural mother or father.

The Legislature of this State has determined that for inheritance purposes, a judicial proceeding to determine

paternity be required and such a determination by the Legislature is reasonable and consistent with their legislative function to protect the interests of the citizens of this State.

So long as the legislative requirement with regard to proof is a reasonable one and so long as once the requirements of proof are made there is no discrimination between inheritance from a natural mother or natural father, the statute which provides for the standard of proof must be deemed constitutional.

The Attorney General respectfully urges that this Court's determination in *Trimble* v. *Gordon, supra,* is limited on its facts to the peculiar statute in Illinois declared unconstitutional. Since the Illinois statute bears no relationship to the New York statute which clearly provides a constitutional framework with regard to inheritance by illegitimates, the determination by this Court in the *Trimble* case, *supra,* should not affect the holding of the New York Court of Appeals in the case at bar.

C

EPTL § 4-1.2 was enacted by the Legislature on the basis of the study and recommendation of the Bennett Commission on Estates (4th Report, Temporary State Comm. on the Modernization, Rev. and Simplification of Laws on Estates, N.Y. Legis. Doc. 1965, No. 19, pp. 233-271).

The State has a responsibility to provide for the orderly devolution of property. There would be insurmountable practical problems involved in meaningful notice to illegitimates in order that procedural due process and finality of decrees and title to property might be achieved.

Within the perimeters of *Trimble* v. *Gordon,* this Court recognized that:

> "The orderly disposition of property at death . . . is a matter particularly within the competence of the

> individual States . . . and, even when constitutional violations are alleged, those courts (i.e. federal courts) should accord substantial deference to a State's statutory scheme of inheritance."

Neither the overall decision of this Court in *Trimble, supra* (whether liberally or narrowly read), nor any other pronouncement of this Court, furnishes any authority for the proposition that EPTL § 4-1.2 is unconstitutional.

The New York statute does not contain unequal discrimination between any classes of illegitimates nor are there any insurmountable burdens with regard to its compliance. It is a procedural statute whose purpose is to see that the interests of all of the people of the State are protected with regard to the determination of property ownership.

It emanates from a careful analysis of the practical and procedural problems of illegitimate succession and falls clearly within this Court's mandates set forth in *Labine* v. *Vincent*, 401 U.S. 532 (1971), *supra*.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appeal should be dismissed or the judgment affirmed.

Dated: New York, New York
May , 1978

Respectfully submitted,

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